APPENDIX A

LAW No. 13,474

JAMES F. REYNOLDS

v.

COMMISSIONER OF DEPARTMENT OF COMMERCE AND DEVELOPMENT

Order

Entered September 27, 1965

Argued January 7, 1966

February 4, 1966. Order sustaining demurrer affirmed.

Order for judgment affirmed.

Rescript February 4, 1966.

Reasons as on file.

APPENDIX B

S-13,474

JAMES F. REYNOLDS

v.

COMMISSIONER OF COMMERCE AND DEVELOPMENT

CUTTER, J. Reynolds, a veteran, seeks a writ of mandamus to compel the commissioner to reinstate him as deputy commissioner. See G. L. c. 23A, § 3 (inserted by St. 1953, c. 409, § 1; see later amendment by St. 1964, c. 636, § 1). As of June 1, 1964, Reynolds had held this position for more than three years. On that day, he was suspended pursuant to G. L. c. 30, § 59 (as amended through St. 1963, c. 829, §§ 1-2, later amended by St. 1964, c. 528), because of his indictment for violations of law (larceny), alleged by the commissioner to be "of a nature . . . to con-

stitute misconduct in office." Reynolds was later found guilty and ordered to make restitution of $251.40. This he has done. He contends that he should not have been suspended except in accordance with G. L. c. 31, §§ 43 and 45, because of the protection given to veterans by G. L. c. 30, § 9A, as amended through St. 1947, c. 242.[1] He has appealed from an order sustaining a demurrer to the petition and from a so called "final decree" which we treat as an order for judgment dismissing the petition. See G. L. c. 213, § 1D, as amended through St. 1957, c. 155.

Bessette v. *Commissioner of Pub. Works,* 348 Mass. 605, 608,[a] established that § 59 (which affords the suspended employee reasonable protection if vindicated) permits suspension of persons subject to civil service without compliance with G. L. c. 31, § 43 (a), as amended, and related statutes. Reynolds, however, contends that application of § 59 to him impairs the obligation of the "contract" governing his employment (see art. 1, § 10, of the Constitution of the United States), because he had served (see c. 30, § 9A) for more than three years. Whether he is regarded as a public officer (*Williams* v. *New Bedford,* 303 Mass. 213, 214; *Nichols* v. *Commissioner of Pub. Welfare,* 311 Mass. 125, 130-131), or as having essentially civil service rights (see *Matter of Eagan* v. *Livoti,* 287 N. Y. 464, 468-469), we conclude that Reynolds possessed no such contractual right to his office as would prevent at least reasonable, nondiscriminatory legislative amendment, in the public interest and for a proper governmental purpose, of the incidents of the

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[1] Section 9A reads, in part, "A veteran . . . who holds an office or position in the service of the commonwealth not classified" under c. 31 (with certain exceptions not here relevant) "and has held such office or position for not less than three years, shall not be involuntarily separated from such office or position except . . . in accordance with" c. 31, §§ 43 and 45, "to the same extent as if said office or position were classified . . . ."

[a] Mass. Adv. Sh. (1965) 367, 369.

office and of the procedure for suspension from that office. The obvious public purpose of § 59, as we indicated in the *Bessette* case (pp. 608-609), was "to protect the public interest," in the light of the "indisputable fact of the indictment," from the inappropriate situation of having an official under indictment engaged in the duties of his office. Section 59 properly provides (p. 609) that "an official indicted for malfeasance in office . . . [shall] be separated from the office pending trial and, if convicted . . . [shall] have no right of reinstatement."[2] In effect, with respect to indicted officials like Reynolds, § 59 merely substitutes for the procedures of c. 31, § 43 (a), other procedures affording due process of law to the suspended official. The enactment of § 59 was clearly within the retained legislative power of regulation, even of existing contract arrangements, in the public interest. See Schwartz, Rights of Property, A Commentary on the Constitution, 283-287.

Indiana ex rel. Anderson v. *Brand,* 303 U. S. 95, upon which Reynolds relies, recognizes (pp. 108-109) that "every contract is made subject to the implied condition that . . . [it] may be frustrated by a proper exercise of the police power . . . for an end which is in fact public . . . [by] means . . . reasonably adapted to that end." See *El Paso* v. *Simmons,* 379 U. S. 497, 508-509. We think that § 59 fully complies with the standard thus stated in the *Anderson* case. In *Huntoon* v. *Quincy,* 349 Mass. 9,[b] on which Reynolds also relies to some extent, no question of legislative amendment of suspension procedures was presented.

Order sustaining demurrer affirmed.
Order for judgment affirmed.

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[2] It is to be noted that, in the event of termination of the criminal proceedings without a finding or verdict of guilty, the final paragraph of § 59 contains suitable provision for the suspended employee's protection. Since Reynolds was found guilty this paragraph is not here relevant.

[b] Mass. Adv. Sh. (1965) 565.

APPENDIX C

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§ 9A. *Veterans holding unclassified positions; separation from state service.* A veteran, as defined in section twenty-one of chapter thirty-one, who holds an office or position in the service of the commonwealth not classified under said chapter thirty-one, other than an elective office, an appointive office for a fixed term or an office or position under section seven of this chapter, and has held such office or position for not less than three years, shall not be involuntarily separated from such office or position except subject to and in accordance with the provisions of sections forty-three and forty-five of said chapter thirty-one to the same extent as if said office or position were classified under said chapter. If the separation in the case of such unclassified offices or positions results from lack of work or lack of money, such a veteran shall not be separated from his office or position while similar offices or positions in the same group or grade, as defined in section forty-five of this chapter, exist unless all such offices or positions are held by such veterans, in which case such separation shall occur in the inverse order of their respective original appointments. Added St. 1946, c. 269, as amended St. 1947, c. 242.

APPENDIX D

§ 59. *Persons under indictment for misconduct in office; suspension; temporary appointees*

An officer or employee of the commonwealth, or of any department, board, commission or agency thereof, or of any authority created by the general court, may, during any period such officer or employee is under indictment for misconduct in such office or employment or for misconduct

in any elective or appointive public office, trust or employment at any time held by him, if he was appointed by the governor, be suspended by the governor, whether or not such appointment was subject to the advice and consent of the council or, if he was appointed by some other appointing authority, be suspended by such authority, whether or not such appointment was subject to approval in any manner. Notice of said suspension shall be given in writing and delivered in hand to said person or his attorney, or sent by registered mail to said person at his residence, his place of business, or the office or place of employment from which he is being suspended. Such notice so given and delivered or sent shall automatically suspend the authority of said person to perform the duties of his office or employment until he is notified in like manner that his suspension is removed. A copy of any such notice together with an affidavit of service shall be filed with the state secretary.

Any person so suspended shall not receive any compensation or salary during the period of such suspension, nor shall the period of his suspension be counted in computing his sick leave or vacation benefits or seniority rights, nor shall any person who retires from service while under such suspension be entitled to any pension or retirement benefits, notwithstanding any contrary provisions of law, but all contributions paid by him into a retirement fund, if any, shall be returned to him.

A suspension under this section shall not, in any way, be used to prejudice the rights of the suspended person either civilly or criminally. During the period of any such suspension, the appointing authority may fill the position of the suspended officer or employee on a temporary basis, and the temporary officer or employee shall have all the powers and duties of the officer or employee suspended.

Any such temporary officer or employee who is appointed as a member of a board, commission or agency of the com-

monwealth, or of any Authority created by the general court, of which the governor is empowered to designate the chairman from time to time, may be designated as such chairman by the governor.

If the criminal proceedings against the person suspended are terminated without a finding or verdict of guilty on any of the charges on which he was indicted, his suspension shall be forthwith removed, and he shall receive all compensation or salary due him for the period of his suspension, and the time of his suspension shall count in determining sick leave, vacation, seniority and other rights, and shall be counted as creditable service for purposes of retirement. Added St.1962, c. 798, § 1, as amended St.1963, c. 829, § 1; St.1964, c. 528.

APPENDIX E

Civil Service

§ 43. *Tenure; discharge, removal, abolition of office, etc.; notice; hearings; review; punishment duty*

(a) Every person holding office or employment under permanent appointment in the official or labor service of the commonwealth, or of any county, city or town thereof, shall have unlimited tenure of office or employment, subject to the provisions of this chapter and the rules made thereunder. He shall not be discharged, removed, suspended for a period exceeding five days, laid off, transferred from such office or employment without his consent, lowered in rank or compensation, nor shall his office or position be abolished, except for just cause and for reasons specifically given him in writing. Before any action affecting employment or compensation referred to in the preceding sentence is taken, the officer or employee shall be given a written statement of the specific reason or reasons for the contemplated action, together with a copy of sections forty-

three, forty-five and forty-six A, and shall be given a full hearing before the appointing authority on the specific reason or reasons given, of which hearing he shall have at least three days' written notice from the appointing authority, except in cases of separation from service in the official or labor service, resulting from lack of work or lack of money or from abolition of positions, in which case at least seven days' written notice of hearing shall be given by the appointing authority. Within two days after completion of said hearing, the appointing authority shall give to the employee affected a written notice of his decision, stating fully and specifically the reasons therefor. As amended St. 1959, c. 569, § 1.

(b) If within five days after receiving written notice of the decision of the appointing authority the person so discharged, removed, suspended, laid off, transferred or lowered in rank or compensation, or whose office or position was abolished, shall so request in writing, he shall be given a hearing before a member of the commission or some disinterested person designated by the chairman of the commission. Said hearing shall be commenced in not less than three nor more than ten days, and shall be completed within thirty days, after the filing of such request, unless, in either case, both parties thereto shall otherwise agree in writing, or unless a continuance is deemed necessary or advisable in the discretion of the hearing officer, and the findings shall be reported forthwith to the commission for action. The decision of the commission shall be in writing and notice thereof sent to all parties concerned within ten days after the filing of the report. If the commission finds that the action of the appointing authority was justified, such action shall be affirmed; otherwise, it shall be reversed and the person concerned shall be returned to his office or position without loss of compensation. The commission may also modify the penalty imposed by the appointing authority. As amended St. 1962, c. 205.

(c) A suspension for a period not exceeding five days may be made only by the appointing authority or by a subordinate to whom authority to make such suspensions has been delegated, or by a chief of police, or officer performing similar duties, however entitled, or by a subordinate to whom such authority has been delegated by him, and shall be made only for just cause. The officer or employee suspended shall be reinstated by the person authorized to make the suspension at the expiration of the period of such suspension, but shall not be entitled to compensation for such period unless, as hereinafter provided, the suspension is found after hearing or upon appeal to have been without just cause. Within twenty-four hours after his suspension, such officer or employee shall be given a copy of sections forty-three, forty-five and forty-six A, by the person authorized to make the suspension, together with a written notice stating the specific reason for the suspension and informing him that he may, within forty-eight hours of his receipt of such notice, request in writing a hearing by the appointing authority on the question of whether there was just cause for the suspension and if so requests he shall be given a hearing within five days of the receipt of such request by the appointing authority. A copy of the notice of suspension to the officer or employee shall be forwarded forthwith to the director of civil service by the person authorized to make the suspension, together with a request for the approval of reinstatement of the officer or employee to be effective at the expiration of the period of suspension. Whenever such hearing is given, the appointing authority shall give the officer or employee suspended a written notice of his decision within two days after the hearing. An officer or employee whose suspension under this paragraph is decided, after hearing, to have been without just cause shall be deemed not to have been suspended and he shall be entitled to compensation for the period for which he was suspended, and if it is decided, after hearing, that there was just cause for such suspension such officer or employee

may appeal to the commission as provided in paragraph (b) and he shall be entitled to judicial review of the action taken by the commission as provided in paragraph (d). The provisions of paragraph (c) shall apply to all hearings under this paragraph. In the computation of any period of time limited by this section, Saturdays, Sundays and holidays shall be excluded. No officer or employee shall be subsequently discharged, removed, suspended for a period exceeding five days, laid off, transferred from his officer or employment without his consent or lowered in rank or compensation, nor shall his office or position be abolished, for the same specific reason or reasons for which he was originally temporarily suspended for a period not exceeding five days under this paragraph except in accordance with paragraph (a). Notice of any action taken by the appointing authority under this paragraph shall be forwarded forthwith to the director of civil service. As amended St. 1959, c. 569, § 2; St. 1963, c. 26, St. 1964, c. 275.

(f) An officer or employee shall automatically be reinstated at the end of the first period for which he was suspended. Any subsequent reinstatement after suspension shall be subject to the approval of the director, and, if denied, an appeal may be taken to the commission as provided in section two (*b*). The notice required by paragraph (*a*) of this section to be given to an employee whom it is proposed to suspend after a prior suspension shall state that his reinstatement after such suspension is subject to the approval of the director. Whenever any hearing is held by a member of the commission or some disinterested person designated by the chairman of the commission, as authorized by paragraph (*b*) of this section, such person shall be paid a sum not to exceed twenty-five dollars per day; and such compensation shall be in addition to any compensation provided for in section two A of chapter thirteen. As amended St.1963, c. 801, § 72.

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(h) Any person holding office or employment under permanent appointment in the official or labor services of the commonwealth, or any county, city, town or district thereof who has incurred expense in defending himself against an unwarranted discharge, removal, suspension, laying off, transfer, lowering in rank or compensation, or abolition of his position, shall, if he engages an attorney for such defense, be reimbursed for such expense; provided, however, that the amount of such reimbursement shall in no event exceed an aggregate sum of nine hundred dollars. Such reimbursement, in each instance, shall be limited to a sum not to exceed two hundred dollars in:—

(1) a hearing by the appointing authority;

(2) a hearing by the civil service commission;

(3) a judicial review by the municipal court of the city of Boston or by the district court within the judicial district where such person resides, as provided in section forty-five.

In addition thereto, reimbursement in each instance shall be limited to a sum not to exceed one hundred dollars for—

(1) summons of witnesses;

(2) cost of stenographic transcript;

(3) any other necessary expense incurred in such defense.

Any such person shall, upon written application made to his appointing authority within thirty days from final disposition of his case be reimbursed from the same source from which his salary is paid. Such reimbursement shall be paid within thirty days from the receipt of such written application by the appointing authority. No reimbursement shall be made except upon receipt of satisfactory proof that such expenses were actually incurred for the purposes set forth in this section. As amended St.1959, c. 569, § 4; St.1962, c. 776.

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§ 45. *Judicial review of removals, etc.* Within thirty days after action by the commission on a hearing provided for in section forty-three, the person who was discharged, removed, suspended, laid off, transferred or lowered in rank or compensation, or whose office or position was abolished, may, if said action was affirmed by the commission, bring a petition in the municipal court of the city of Boston or in the district court within the judicial district of which such person resides, addressed to the justice of the court, praying that the action of the appointing authority and of the commission in discharging, removing, suspending, laying off or transferring him or lowering him in rank or compensation or abolishing his office, may be reviewed by the court, and, after such notice to the appointing authority and the commission as the court deems necessary, it shall hear witnesses, review such action, and determine whether or not upon all the evidence such action was justified. If the court finds that such action was justified the action of the appointing authority and of the commission shall be affirmed; otherwise they shall be reversed and the petitioner shall be reinstated in his office or position without loss of compensation. The decision of the court shall be final and conclusive upon the parties, and a copy of the decision shall be forwarded forthwith by the clerk of the court to the director. As amended St.1934, c. 249, § 2; St.1945, c. 667, § 2; St. 1955, c. 407, § 2.